STATE OF MICHIGAN

COURT OF APPEALS

SEAN FEYEN, CRAIG BALAS, and JOEY HUFNAGEL, Plaintiffs-Appellants, v GREDE II, LLC, Defendant-Appellee.	UNPUBLISHED April 19, 2012 No. 304137 Kent Circuit Court LC No. 10-006394-CK

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

In this action for breach of contract, plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs Sean Feyen, Craig Balas, and Joey Hufnagel were former employees in management positions at Citation Innovative Metal Components. Citation was sold in March of 2009, and defendant, which succeeded Citation, is responsible for all of the company's liabilities. Plaintiffs contend that before Citation was sold, they were offered retention agreements that offered them severance pay if they agreed to remain employed at the company after the sale. Citation communicated this purported offer to plaintiffs in letters in November of 2008. Each plaintiff received a letter that was identical to the others; the letters provided in pertinent part:

> [i]n order to continue to meet our customer requirements and make this process as successful as possible; we are asking that you remain employed here until you are released by the company.
>
> In order to help in the transition and to provide you with an incentive to remain with us until your job ends, we are offering a retention incentive. A summary of the retention agreement being offered to you is outlined here:
>
> As an employee on the active payroll today, you will be offered a retention agreement equivalent to 25 weeks of your current base salary (less legally required deductions), paid in regular installments on normal bi-weekly payroll dates, if you remain an employee in good standing until released by the Company[.]

> In addition, a salary continuation supplement equivalent to 26 weeks of COBRA payments for the level of insurance coverage in place at severance (less legally required deductions) will be paid in regular installments on normal bi-weekly payroll dates.
>
> Payments under the retention agreement will require execution of a release provided by the company as well as compliance with all other terms of the release document.

After this letter was issued but before the company was sold, Citation sent a second letter to plaintiffs on February 3, 2009, with the following addition in boldface type:

> This retention agreement will not apply to you in the event the Grand Rapids facility is sold and you are offered a position with the new company. However, should your position with the new company be terminated within sixty (60) days after the sale of the Grand Rapids business to the new owner, you will be eligible for this retention agreement.

Plaintiffs contend that the November 2008 letters were binding contracts and that they accepted these contracts by remaining employed with the company after the sale was complete. They also contend that the February 3, 2009, letter was an invalid attempt to modify the original binding agreement. Defendant disagrees and contends that neither of the letters created a binding contract. We agree with defendant and affirm the trial court's order granting summary disposition, although we do so on grounds other than those articulated by the trial court.

Initially, we note that the issue of whether the letters were binding was not decided by the trial court. However, the issue was raised before the trial court, so it is preserved for our review. *Peterman v State Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We also note that the issue was not raised in the statement of questions presented for appeal. Generally, we will not decide an issue that is not raised in the statement of questions presented. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 646; 732 NW2d 116 (2007). Nevertheless, we overlook the presentation deficiency in the case at bar because a resolution of the issue is necessary for a proper determination of the outcome of the case. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

"The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "Before a contract can be completed, there must be an offer and acceptance." *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). "An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id.* (Quotation omitted). Because a valid offer must give the offeree the power of acceptance, "[a] mere expression of intention does not make a binding contract . . . ." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). Rather, "[a] valid contract requires mutual assent on all essential terms," and such mutual assent cannot occur without a valid offer. *Eerdmans*, 226 Mich App at 364. Mutual assent "is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kloian*, 273 Mich App at 454 (quotation

omitted). Moreover, if one party manifests an intent not to be bound by an offer, there is no mutual assent. *Angelo DiPonio Equip Co v State, Dep't of State Hwys & Transp* 107 Mich App 756, 759-760; 309 NW2d 566 (1981). For instance, if one party indicates that it does not wish to be bound until a future written agreement is executed, the contract fails for a lack of mutual assent. *Id.*

In this case, there was no mutual assent because both the November 2008 and the February 3, 2009, letters from Citation expressed the company's intention not to be bound by the letter. The letters expressed an intent not to be bound because they utilized language to convey that the letters themselves were not offers. Both letters indicated that an offer would be forthcoming in a subsequently executed retention agreement. Thus, the letters were merely an expression of Citation's future intentions, and were not binding agreements. See *Kamalnath*, 194 Mich App at 549. Indeed, rather than expressing a manifestation of willingness to enter into a bargain, the letters expressed an intent not to be bound until a future agreement, i.e., the retention agreement, was executed. See *Eerdmans*, 226 Mich App at 364; *Angelo DiPonio Equip Co*, 107 Mich App at 759-760.

Moreover, the letters expressed Citation's intent not to be bound because they stated that they were a summary of the retention agreement that was going to be offered in the future. Thus, they were merely a memorandum that summarized the terms of an agreement that would be offered at a later date. Such a summary cannot be objectively viewed as an offer that could create a binding contractual agreement. See *Bailey v Schaff*, 293 Mich App 611, 625-626; __ NW2d __ (2011) (where a letter indicates that it is not final because it does not include all of the terms, there is no meeting of the minds).

Accordingly, as a matter of law, because we find that both sets of letters expressed Citation's intent not to be bound, the purported contract fails for lack of mutual assent. See *Angelo DiPonio Equip Co*, 107 Mich App at 759-760. See also *Eerdmans*, 226 Mich App at 364. Because there was no contract, there was no genuine issue of material fact regarding plaintiffs' breach of contract claim. Accordingly, summary disposition in favor of defendant is appropriate even though the trial court granted summary disposition on different grounds. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005) (this Court will affirm the trial court where it reached the right result, albeit for the wrong reason).

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens